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No. 04-449

IN THE
SUPREME COURT OF THE UNITED STATES

Michael David Lamont, Jr.,

Petitioner,

v.

Christine and Patrick O'Donnell,

Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Oregon

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Or. Rev. Stat. 109.119 *et seq.*, amended by the 2001 Oregon legislature to comply with the dictates of *Troxel v. Granville*, 530 US 57 (2000), was constitutionally *applied* by the Oregon Supreme Court when it found as follows:

> Considering all the evidence, we conclude, on *de novo* review, that grandparents have rebutted, by a preponderance of the evidence, the presumption that father acts in the best interests of the children.

Pet. Cert., App. A-38.

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INTRODUCTION

Respondents are the maternal grandparents and, under state law, the "psychological parents," who have been awarded custody of their two grandchildren by the Oregon Supreme Court.

STATEMENT OF THE CASE

Because this case involves a third-party custody dispute, it is heavily fact dependent. The Oregon Supreme Court reviewed this record *de novo* and entered lengthy findings of fact and further supplemented those facts throughout its opinion. *See,* Pet. Cert., App A-3-5. This Court is urged to rely upon the facts as found by the Oregon Supreme Court because father's fact statement is not always complete. For example, father writes:

> The [trial] court ordered the children returned to father, who agreed he would keep them in the Salem, Oregon area. App D-3,4. Father moved with the children to Montana for a brief six week period (Findings 31 and 32; App B-7,8), but returned the children to Oregon when ordered by the trial court to do so. App D-4.

Pet. Cert., 2. In comparison, the Oregon Supreme Court found these facts as follows:

> Father assured the [trial] court he would keep the children in the Salem area.

> However, despite that promise, father moved to Montana with the children and his girlfriend, Laura Oliver, in September 1999, without notice to the court or the grandparents. Father refused to disclose his address in Montana to grandparents and avoided grandparents' efforts to serve him legal papers. The court found father in contempt and ordered him to return the children to Oregon, which he did.

Pet. Cert., App A-5. The trial court described father's disappearance to Montana with the children as follows:

> it would be only a slight exaggeration to say that [father] folded his tent in the middle of the night and left without a trace.

Letter Opinion, 4 (July 25, 2000).

REASONS TO DENY THE WRIT

1. The States serve as the primary sources of law for the nation's family law courts. Although this Court, in *Troxel v. Granville*, 530 US 57 (2000), recognized a rebuttable presumption that a fit parent will act in the best interests of his or her children, this Court did not establish a due process standard, and, in fact, declined to do so, reserving that work for the States. *Id.* at 73.

2. In response to this Court's opinion in *Troxel v. Granville*, the Oregon Legislature established Oregon's due process

standard. Acting within a permissible range, the Oregon Legislature passed the 2001 amendments to Or. Rev. Stat. 109.119 *et seq.*, establishing a new statutory presumption, burden of proof, and factors analysis intended by the state to comport with *Troxel v. Granville* when resolving third-party custody disputes.

3. The constitutionality of Oregon's new statutory scheme is not in dispute, as "[t]he parties agree that [the new statute] is facially constitutional." *See,* Pet. Cert., App A-21.

4. Oregon's new statutory presumption, burden of proof, and factors analysis were applied consistent with *Troxel v. Granville*. The 2001 amendments (set out in the text of the Oregon Supreme Court opinion, *see*, Pet. Cert., App. A-19-22) provide the constitutional protection to which father is entitled in the form of a legal presumption in his favor together with a new statutory burden of proof and factors analysis to establish the due process standard, thereby giving effect to the legal presumption that a fit parent acts in the best interests of the child and "special weight" to the parenting decisions of a fit parent. *Id.*

5. Oregon's new statute is narrowly drawn. It is only because grandparents are also psychological parents that they may seek custody by a preponderance of the evidence. Otherwise, the statute limits grandparents to "visitation or contact rights" by clear and convincing evidence. Or. Rev. Stat. 109.119(3)(b).

6. The trial court found that grandparents are psychological parents, a finding that is not disputed:

> The grandparents clearly meet the statutory definition of psychological

> parents. The grandparents have established a child-parent relationship with the children under ORS 109.119(5)(a).

Letter Opinion, 8.[1] [2]

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[1] Or. Rev. Stat. 109.119(5)(a) has been renumbered to Or. Rev. Stat. 109.119(8)(a), but the definition of a "child-parent relationship" remains the same except that the duration of the relationship required for foster parents must exceed 12 months under the current statute instead of 18 months under the former statute.

[2] Should any disputed facts be important to this Court's assessment, the trial court also entered credibility findings against father:

> Indeed, my overriding impression of Father is that honesty has no value for him. He has said whatever he believed would help him at the time, without regard to its truthfulness. Father's word alone is insufficient to prove anything.

Letter Opinion, 3 (July 25, 2000). The trial court further commented that:

> I counted over 25 lies by Father. These range from statements to Judge Letourneau regarding remaining in the Salem area to statements concerning Ms. Oliver's anger and drug issues. They include denials of statements Dr. Vien attributed to him and denials of the nature and number of restraining order violations.

Id. at 3, fn 2.

7. Grandparents are psychological parents because a "child-parent relationship" exists, meaning that they have fulfilled the role of a legal parent:

> (a) "Child-parent relationship" means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise *made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs*. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

Or. Rev. Stat. 109.119(8)(a) (emphasis added). The trial court's findings that the grandparents are psychological parents is compelling:

> On a daily basis, the grandparents provided the children with food, clothing, shelter and incidental necessaries as well as care, education, and discipline. This was accomplished through interaction, companionship, interplay and mutuality that fulfilled the children's physical and psychological need for a parent. At the children's most vulnerable hour, the grandparents took them in, fed them, loved them, and guided them. Because of the years of close contact between the grandparents and the children, it was natural for the grandparents to do this and for the children to look to them for this parenting. It is important to remember that this is not a case where grandparents hopped on a plane in order to step into the breach brought on by the unexpected death of their Daughter. These grandparents were geographically and emotionally close to the children throughout their lives.

Letter Opinion, 9.

8. The Oregon Supreme Court found that:

> awarding custody to father would pose a serious present risk of psychological or emotional harm to the children.

See, Pet. Cert., App A-33; *see, also, id. at* App A-35 ("Having reviewed the entire record, we find that circumstances detrimental to the children would exist if custody is granted to father"). The Oregon Supreme Court further found that grandparents rebutted the legal presumption in father's favor:

> Considering all the evidence, we conclude, on *de novo* review, that *grandparents have rebutted*, by a preponderance of the evidence, *the presumption* that father acts in the best interests of the children.

Pet. Cert., App. A-38 (emphasis added).[3]

9. Finally, the Oregon Supreme Court correctly understood and applied *Troxel v. Granville*:

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[3] The Oregon Supreme Court's findings and ruling were not much different than the trial court's findings and ruling:

> In short, all the dangers that father presented to the children at mother's death are still there. These circumstances present sufficient threat of harm to the children to defeat whatever supervening right Father may have as a biological parent. Although Father is not so unfit as to justify termination of his parental rights, he is sufficiently dangerous to their welfare to justify limitation of his parental rights under Oregon's statute. This application of the statute is consistent with Father's state and federal constitutional rights.

Letter Opinion, 8.

As our earlier discussion of *Troxel* demonstrates, that case does not sweep as broadly as father asserts. *Troxel* specifically declined to address the so-called "harm" standard, and it also failed to articulate an "inadequate care" requirement. Rather, the due process right that the Supreme Court affirmed in *Troxel* is important, but limited: a court may not override a parent's decision about the care or custody of a child simply because the court determines that the decision is not in the child's best interest, as the trial court did in *Troxel* regarding a grandparent's interest in visitation. *Instead, the court must presume that a fit parent's decision is in the best interest of the child, and the court may reach a decision contrary to the wishes of the parent only if there is evidence sufficient to overcome that presumption. Troxel* goes no further.

Troxel does require the state to give "some special weight" to the interest of a parent in decisions regarding a child. ORS 109.119, as we have interpreted and applied it here, responds to that mandate and appropriately protects father's due process rights. *In our factual findings and legal conclusions, we have followed the statute and presumed that father acts in*

> *the best interests of the children*. We have considered a petition by grandparents who have the status, under the statute, of psychological parents. We have examined factors reasonably identified by the legislature as relevant to making a custody decision, *and we have concluded, by a preponderance of the evidence, that the evidence in support of those factors overcomes the presumption that father will act in the best interests of the children*. Father received the deference to his due process rights that *Troxel* requires. For the foregoing reasons, we award custody of the children to grandparents, with parenting time, as determined by the trial court, to father.

Pet. Cert., App A-41-42 (emphasis added).

CONCLUSION

FOR THE FOREGOING REASONS, grandparents urge that the petition for writ of certiorari be denied.

Respectfully submitted,

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